NO. 91-840

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1991

MARY A. COLLINS,
Petitioner

v.

BAPTIST MEMORIALS GERIATRIC CENTER
and ODUS TAYLOR HENLEY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether employers such as Odus Henley and Baptist Memorials Geriatric Center should be required to clearly set forth specific, legitimate reasons for terminating an employee such as Mary Collins within a few hours after she openly opposes the sexual harassment of female employees by the employers.

II. Whether a female employee such as Mary Collins should be allowed to prove that the reason given for her firing was pretextual by showing indirectly that the employers' proffered explanation was unworthy of credence.

III. Whether, in proving a hostile environment claim, the law requires an onerous, higher standard of proof for the fired female employee in proving that the hostile working environment affected a term or condition or privilege of her employment.

IV. Whether in sexual harassment cases non-advisory jury findings on narrow state law issues, absent any instruction to the jury on Title VII standards and burden shifting guidelines, should be allowed as substitutes for specific fact findings by a district court under applicable Title VII standards and burden shifting guidelines.

V. Whether a district court should be required to make findings of fact using the correct Title VII standards and burden shifting guidelines in order to facilitate review.

LIST OF PARTIES

The parties to the proceeding below were:

Petitioner here, Plaintiff - Appellant, Mary A. Collins.

Respondents here, Defendants - Appellees, Baptist Memorials Geriatric Center and Odus Taylor Henley.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Mary A. Collins ("Collins"), respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 2, 1991, rehearing denied on August 29, 1991.

OPINIONS BELOW

The August 2, 1991 opinion of the Court of Appeals for the Fifth Circuit was published at 937 F.2d 190. A copy of the opinion is attached hereto as Appendix A. The August 29, 1991 order of the Court of Appeals denying the Petition for Rehearing is attached hereto as Appendix B. The May 3, 1990 Judgment of the United States District

Court for the Northern District of Texas was unpublished. It is attached hereto as Appendix C. The District Court's unpublished May 3, 1990 Order stating its original finding of fact and conclusions of law is attached hereto as Appendix D. The District Court's Charge to the Jury on the state law issues and the corresponding jury findings is attached hereto as Appendix E.

JURISDICTIONAL STATEMENT

The judgment and opinion of the Court of Appeals for the Fifth Circuit was entered on August 2, 1991. The Petition for Rehearing was denied on August 29, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case is a sexual harassment case involving Title VII, in particular, 42 U.S.C. §2000e-2 (a) (1964), as follows:

> (a) It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's

> race, color, religion, sex, or national origin.

and 42 U.S.C. §2000e-3 (a) (1964), as follows:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

On March 21, 1988, Mary A. Collins, Personnel Director, was fired by Baptist Memorials Geriatric Center (the "Center"). She was fired by its Executive Director, Odus Taylor Henley ("Henley"). The Center is a large retirement facility for the elderly, located in San Angelo, Texas. Henley was the top officer of the corporation. It has over 300 employees, some 275 of whom are women. Collins was fired within a few hours after she had provided to a member of the Center's Board of Trustees, Bill Denton ("Denton"), several typewritten statements concerning the sexual harassment of female employees at the Center by Henley. The statements she provided to Denton are attached hereto as Appendix F. To this date, the Center and Henley have never provided a specific reason for firing Collins on that day in which she was participating in an activity purportedly protected by Title VII, other than merely stating that she was fired for insubordination. They have

never provided any specifics concerning her alleged insubordination.

The severity of the sexual harassment perceived by women at the Center had already been noted by men in high-level positions at the Center, prior to the situation that led to the firing of Collins. The former Executive Vice President at the Center, Vic Rhoads ("Rhoads"), had been approached by several women and men at the Center who were concerned about Henley's physical touchings of his women employees. The women were concerned that their response to the physical touchings of them by Henley might affect their jobs. Henley's secretary, Mary Butts, was the recipient of a number of improper physical touchings by Henley that were seen at the workplace by several witnesses. Rhoads, himself, witnessed one such improper embrace between Henley and Mary Butts. Butts later told Rhoads she had to do what she had to do to keep her job. Other women employees were offended and upset by unwelcome touchings of their bodies by Henley. In 1987, Rhoads met with the Chairman of the Center's Board of Trustees, Frank Sanders, and told him charges of sexual harassment by Henley could be forthcoming from the Center's women employees. Sanders took no action.

The physical touchings being witnessed included women employees' breasts being touched by Henley, women employees' buttocks being touched by Henley, women employees' being pulled up in full frontal or sideways hugs by Henley, women employees' backs being rubbed by Henley, women employees' bra straps being popped and other instances of improper physical contacts by Henley. There were numerous witnesses at trial to these touchings. Instances involving Henley's offensive touchings of a woman volunteer and a woman selling furniture to the Center were also reported. The physical contacts of women employees by Henley were the subject of frequent discussions by the women employees of the

Center, many of whom were offended by it. Henley did not touch men in the same offensive manner. The current Executive Vice President, Wayne Merrill, had also discussed the matter with Vic Rhoads. Other Board members were also aware. Women employees were also reporting these offensive touchings by Henley to Collins, the Center's Personnel Director. Collins herself had also experienced Henley's unwelcome touchings. She had learned to put a desk between him and her or to stay out of the copy room with him. She was a witness to his offensive touchings of other women employees. She had complained to Rhoads before he left the Center. She wanted to post a written sexual harassment policy, but Henley would not allow it. All of this led up to Collins discussing the matter with the Equal Employment Opportunity Commission, an attorney and Board member Denton, beginning in December, 1987.

Wayne Merrill's secretary at the Center, Susan Myers, sent anonymous letters concerning the situation to Board members during this same time period. They are attached hereto as Appendix G.

In mid February, 1988 and in early March, 1988, while Collins was gathering the statements and carrying on discussions with Denton about the situation, Henley reprimanded her twice. He reprimanded her once for issuing "unauthorized" cash advances and once for "unauthorized" early release of a paycheck. Collins was not fired upon receiving these reprimands. The Center had a policy of requiring three reprimands prior to firing. As it turned out, Henley and the Center could not provide any specific basis for either of the earlier reprimands. In fact, all cash advances and early paycheck releases during this time were proven at trial to have had the authorization of Henley. There was no reason articulated by the Center for any action against Collins on the day she was actually fired. Henley and the Center relied solely on poor record-

keeping practices as the reason why they could not provide any specific basis for the firing of Collins.

After proceeding initially with the EEOC, Collins obtained the right to sue and she sued the Center and Henley on January 17, 1989. Trial proceeded in San Angelo, Texas on April 9-13, 1990 with the Title VII matters being tried to the District Court. State law issues, including the very narrow exceptions to the "at will" employment rule in Texas, were submitted to the jury. The District Court acknowledges that the Title VII issues were tried to it in its May 3, 1990 Order. See Appendix D. No request was ever made that the jury be an advisory jury. The jury found that the Center failed to exercise ordinary care in investigating and stopping sexual discrimination and harassment but found against Collins on her other state law claims.

On May 3, 1990 the District Court signed its Order making its findings of fact and conclusions of law with regard to Collins' federal law claims under Title VII. It is attached hereto as Appendix D. The District Court entered Judgment in favor of Henley and the Center. It is attached hereto as Appendix C. Collins then timely appealed the District Court's Order and Judgment to the United States Court of Appeals for the Fifth Circuit. On August 2, 1991 the Fifth Circuit affirmed the District Court's Judgment with regard to the retaliation and hostile environment claims but remanded to the District Court for further findings upon the quid pro quo claims. *Collins v. Baptist Memorials Geriatric Center*, 937 F.2d 190 (5th Cir. 1991) (hereinafter "*Collins*"). On August 29, 1991 the Fifth Circuit denied Collins' Petition for Rehearing. On the same date the District Court entered Additional Findings of Fact and Conclusions of Law taken verbatim from the Defendants' submittal on remand. The Additional Find-

ings of Fact and Conclusions of Law are now the subject of a second appeal to the Fifth Circuit. They are attached hereto, for the Court's information, as Appendix H.

At issue here is the decision of the Fifth Circuit affirming the District Court's Judgment and Order in favor of the Center and Henley on the retaliation and hostile environment claims. Those issues were first raised in the District Court. The Fifth Circuit has not required the Center and Henley to articulate legitimate, specific reasons for firing Collins. The Fifth Circuit ignored Collins' indirect evidence that the insubordination reason stated by the Center and Henley for firing her was clearly pretextual. The Fifth Circuit imposed a commensurately higher standard of proof for showing hostile environment. This conflicts with precedence that proof of a prima facie case is not an onerous burden. Both lower courts ignored precedential Title VII standards and burden shifting guidelines.

Because of the importance of establishing clear precedent, because of the Fifth Circuit's departure from United States Supreme Court precedent in this sexual harassment case and because of a conflict between the circuits on the use of indirect evidence to prove pretext, Petitioner has appealed.

REASONS FOR GRANTING THE WRIT

1. **TITLE VII AND SUPREME COURT PRECEDENTS REQUIRE EMPLOYERS SUCH AS HENLEY AND THE CENTER TO CLEARLY SET FORTH SPECIFIC, LEGITIMATE REASONS FOR TERMINATING AN EMPLOYEE SUCH AS MARY COLLINS WITHIN A FEW HOURS AFTER SHE OPENLY OPPOSES THE SEXUAL HARASSMENT OF FEMALE EMPLOYEES BY THE EMPLOYERS.**

THE FIFTH CIRCUIT'S OPINION IS IN CONFLICT WITH THESE PRECEDENTS.

Title VII, 42 U.S.C. §2000e-2 (1964), *et. seq.* protects employees in the workplace from sexual harassment. The United States Supreme Court set forth the shifting burden of proof guidelines in a discrimination lawsuit as follows:

> First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." . . .Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pre-text for discrimination.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-254, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207, 215 (1981) (hereinafter "*Burdine*"). Accord, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1973). 42 U.S.C. §2000e-3(a) (1964) makes it "an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . .".

Mary Collins turned in the written reports of harassment and discrimination that she had gathered to one of Baptist Memorials Geriatric Center's Trustees on the morning of March 21, 1988. Within a few hours of that purportedly protected activity, she was fired. The Center and

Henley state that the singular reason she was fired was because she was insubordinate. Other than making this conclusory statement, the Center and Henley could not provide any specifics of any event that prompted the termination of Collins. With regard to the day she was fired, no insubordination of any kind was identified. The Center and Henley attempt to refer back to two previous reprimands of Collins, weeks earlier, for approving unauthorized cash advances and releasing paychecks early without authorization, but they fail to identify or document any unauthorized advances or any unauthorized paycheck releases. In fact, the documentation shows that all cash advances and paycheck releases during that time period were fully authorized. Their failure to identify or document any instances of insubordination is allegedly due to poor record-keeping. The Fifth Circuit finds this level of proof by the employers acceptable. It requires nothing more of Henley and the Center in articulating specific, legitimate reasons for terminating Mrs. Collins. In this regard, the Fifth Circuit is in conflict with United States Supreme Court precedent.

The United States Supreme Court in *Texas Department of Community Affiars v. Burdine,* supra at 254-256 established a stricter standard of proof with regard to the showing that an employer must make of its non-discriminatory reasons for the adverse employment action at issue:

> . . . the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a **legitimate**, non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . It is sufficient if the defendant's evidence raises a **genuine** issue of fact

> as to whether it discriminated against the plaintiff. To accomplish this, the defendant must **clearly** set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be **legally sufficient** to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. **The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.** Emphasis added.

Every employer previously faced with this burden in a Title VII case is now essentially instructed by the Fifth Circuit that a muddled, nonspecific allegation of insubordination such as that made against Mary Collins by Henley and the Center, supported by absolutely no documentation, will suffice in carrying this burden. In other words, no specifics and no documentation need be provided.

There is no evidence that any actual insubordination on the part of Mrs. Collins caused her to receive a third and final reprimand. The Fifth Circuit acknowledges Henley's admission that he cannot specifically identify anything that final morning that constituted insubordination by Mrs. Collins. *Collins,* at 194. How can the Center and Henley now be said to have framed the factual issue with sufficient clarity so that Mrs. Collins could demonstrate pretext on that day? What insubordination did she commit? The answer, none.

Furthermore, although the Center and Henley mouthed the word "insubordination" in connection with previous incidents involving cash advances and the issuance of a paycheck before payday, absolutely no specifics were provided. *Collins*, at 193. Collins is required to defend against non-specific allegations. How can she defend against the unknown? Employers, in taking guidance as it presently stands from the Fifth Circuit's opinion, are taught that less is better. Poor record-keeping and an absolute memory block will substitute for specific, clearly set forth, legitimate reasons for adverse employment decisions.

A broad application of Title VII should require much more of the employer. In fact, it is the belief of Collins that the United States Supreme Court in *Burdine, supra* did set forth a standard requiring more of employers than the District Court and the Fifth Circuit Court of Appeals have required of Henley and the Center in this instance. As the Fifth Circuit itself has stated:

> We are well aware that the provisions of Title VII must be construed broadly in order to give effect to Congress' intent in eliminating invidious employment practices. . . Moreover, since the enforcement of Title VII rights necessarily depends on the ability of individuals to present their grievances without the threat of retaliatory conduct by their employers, rigid enforcement of §704(a) is required.

Jones v. Flagship International, 793 F.2d 714, 726 (5th Cir.), *cert denied*, 479 U.S. 1065, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987). Rigid enforcement of Title VII requires more of employers than the Fifth Circuit and the District Court have required of Henley and the Center up to this point. The United States Supreme Court has expressly stated that more is required of employers.

Petitioner Collins' Petition for a Writ of Certiorari should be granted and, ultimately, the decision of the Fifth Circuit and the District Court on wrongful retaliation should be reversed and remanded. Henley and the Center have not even remotely met their burden. A strong Title VII requirement that employers be required to clearly and specifically articulate legitimate reasons for the discharge of a person within a few hours after she engages in a protected activity should be re-emphasized by this Court.

II. AN EMPLOYEE SUCH AS MARY COLLINS SHOULD BE ALLOWED TO PROVE THAT THE REASON GIVEN FOR HER FIRING WAS PRETEXTUAL BY SHOWING INDIRECTLY THAT THE EMPLOYERS' PROFFERED EXPLANATION WAS UNWORTHY OF CREDENCE. THE FIFTH CIRCUIT'S OPINION IS IN CONFLICT WITH THE SUPREME COURT'S PRIOR DECISION AND WITH OTHER CIRCUITS.

In *Burdine, supra* the United States Supreme Court stated that a plaintiff may succeed in showing pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256. See *McDonnell Douglas Corp. v. Greene,* 411 U.S. 792, at 804-805, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). These direct and indirect methods of proving discriminatory intent were reiterated in *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983). As stated in *King v. Palmer,* 778 F.2d 878, 881 (D.C. Cir. 1986):

> *Burdine* makes it absolutely clear that a plaintiff who establishes a *prima facie* case of intentional

> discrimination and who discredits the defendants' rebuttal should prevail, even if he or she has offered no direct evidence of discrimination. . .Thus, the mandate of *Burdine* is clear: a district court may not require direct evidence of intentional discrimination as opposed to indirect evidence that carries the burden of persuasion by discrediting the defendants' rebuttal. Moreover, a district court may not require direct evidence of intentional discrimination as opposed to circumstantial evidence thereof.

The Fifth Circuit, in the present opinion with respect to the issue of retaliation, held Mrs. Collins to a standard of proof with regard to pretext that required her to prove directly that Henley and the Center had "retaliatory motive." The Fifth Circuit stated:

> In sum, the evidence produced at trial was complex, confusing and even contradictory. The resolution of the retaliatory motive issue turned largely on credibility choices. If, as he claimed, Henley had no knowledge that Collins was gathering the statements, then it would be difficult to attribute a retaliatory motive to him. And the strength of the circumstantial evidence of pretext turned largely on the "leak" conversation, a conversation denied by both Henley and Sanders. In fact, the only evidence of the "leak" conversation came from Myers and Collins. *Collins* at 194.

Thus, the Fifth Circuit has used a standard that limits the employee to proving directly that a discriminatory reason more likely motivated the employer. The "leak" conversation was direct evidence of discriminatory intent and there was contradictory evidence at trial. The Fifth Circuit

ignored and did not utilize, however, the uncontradicted pretext evidence under the indirect method allowed by the Supreme Court. In this respect it is in conflict with the Supreme Court and with the D.C. Circuit. According to those Courts, pretext can be shown indirectly by showing that the employer's proffered explanation is unworthy of credence. Mrs. Collins made an overwhelming showing that the proffered reason for her termination was unworthy of credence.

In its discussion on retaliation, the Fifth Circuit discusses at length the very evidence that proves that the Center's and Henley's proffered explanation of the termination of Mary Collins is unworthy of credence. *Collins*, at 193-95. Henley and the Center assert that Mary Collins was fired for insubordination. And yet, no witnesses could give any specific instances of insubordination. The Center by its own policy requires three reprimands prior to termination. It is uncontroverted that Henley could not identify any specific thing that prompted him to terminate Collins on the morning that she delivered the purportedly protected statements. The third reprimand is thus unsupported by even any phony reason. Furthermore, he could not justify his prior reprimands of Mrs. Collins because of alleged poor record-keeping. Mrs. Collins easily and thoroughly discredited the cash advance and early paycheck hoaxes put forward by the Center and Henley. The Center's and Henley's proffered explanation of insubordination is unsubstantiated and unworthy of credence. The evidence to that effect is not confusing and it was not contradicted. It was simply ignored by the lower courts.

The effect of the Fifth Circuit's holding, if left unchanged, is to allow employers to obtain credence for their proffered explanation simply by saying nothing and by pro-

viding no support. It allows doubts to be resolved in favor of the employer who provides no specifics. This should not be an acceptable standard. Title VII is to be and should be broadly construed to protect each and every individual. *Jones v. Flagship International, supra.* Employers must be held to a standard of substantiating their employment decisions with credible specifics. This should be required even more so where, as here, an employer fires an employee within hours of her engagement in a protected activity. The United States Supreme Court should grant Petitioner's petition and, upon final review of the case, reverse in favor of Mrs. Collins on the claim of retaliation and remand for further findings consistent with the Supreme Court's opinion.

III. THE FIFTH CIRCUIT IMPOSED A HIGHER STANDARD OF PROOF THAN THAT REQUIRED BY LAW ON MRS. COLLINS' PROOF THAT THE HOSTILE WORKING ENVIRONMENT AFFECTED A TERM OR CONDITION OR PRIVILEGE OF HER EMPLOYMENT. THIS CONFLICTS WITH SUPREME COURT PRECEDENT.

The Fifth Circuit, in its present opinion, states:

> At trial the weakest link in Collins' hostile environment claim became the issue of whether any physical contacts of Henley with other female employees altered a term of Collins' employment. . . Psychological well-being is a term, condition, or privilege of employment within the meaning of Title VII, but a claim based on psychological harm "requires a commensurately higher showing that the sexually harassing conduct was pervasive and destruc-

tive of the working environment." *Collins,* at 195.

The Fifth Circuit under this self-imposed higher standard went on to conclude that the evidence presented by Collins and its effect on the psychological terms of her own working environment was far from compelling. The Fifth Circuit cited the jury's finding that the Center's negligence under state law was not a proximate cause of damages to Collins in support of its determination of this Title VII question.

The United States Supreme Court has recognized the hostile environment theory as the basis for a sexual harassment case. *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 91 L.Ed.2d 49, 106 S.Ct. 2399 (1986). The standard being applied by the Fifth Circuit in a hostile environment case is obviously too high where, in an instance such as this, it does not protect a female employee from a hostile environment in the work place. Much of the proof presented by Collins in this regard was not even discussed by the Fifth Circuit. When Collins first went to work in early 1986 at the Center, she was personally subjected to the physical gropings of Henley. [It is interesting to note that the District Court acknowledges this and characterizes it as harassment in its most recent Additional Findings. See Appendix H.] She testified that she learned to put a desk between her and him and to stay out of the copy room with him. Even Vic Rhoads, the former Executive Vice-President of the Center, testified about Collins coming to him and complaining and about his advice to Collins to keep some distance between Henley and herself. This alone is compelling evidence that the terms, conditions or privileges of her employment were altered. There was more.

Many employees came to Collins to relate their

troubles caused by Henley's groping of his female employees. In late 1987 when Collins began gathering information at Trustee Bill Denton's request, she was already troubled enough to contact the Equal Employment Opportunity Commission. She also made an initial contact with an attorney at that time. She was advised by the EEOC to begin to document occurrences affecting her on the job. She did so. The increasing mistreatment of her by Henley was documented in her personal memos to her file marked as Plaintiff's Exhibits 87-93. During this time Collins was frequently discussing the incidents of sexual harassment with Trustee Denton over the phone. Denton, in turn, was talking to others at the Center about the complaints. He even discussed such matters in general with Henley and Wayne Merrill. Collins was then reprimanded twice by Henley, without any substantiated basis. Finally, she was fired within hours of filing the reports of sexual harassment that she had obtained for Trustee Bill Denton. Collins testified at trial about the mental anguish she suffered during this period of time.

Title VII is not to be narrowly construed. It is to be broadly construed. The burden of establishing a prima facie case is not onerous, as the Fifth Circuit is implying. *Burdine*, at 253-54. The Fifth Circuit's onerous standard for proving hostile environment discrimination is thus in conflict with United States Supreme Court precedent. A simple preponderance of the evidence standard should be the rule.

By any standard, high or low, Mary Collins has demonstrated that the hostile environment for women that existed at the Center affected a term or condition or privilege of her employment. An employee who is not psychologically affected does not begin gathering statements of the important nature of these statements

about her boss. She does not contact the Equal Employment Opportunity Commission. She does not keep memoranda in a file documenting troubling instances at work during the same period of time. She does not consult with an attorney. She does not have to worry about staying out of the copy room with her boss or putting a desk between him and her. She is not the recipient of statements about harassment from troubled co-workers. She does not receive unsubstantiated reprimands. She is not fired. All of these are proof of the psychological effect of these occurrences on Mrs. Collins. The Supreme Court in no way limited this concept to intimidation or ridicule of an explicitly sexual nature. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3rd Cir. 1990). The standard to which she is being held in proving her claim of hostile environment as applied by the Fifth Circuit is simply too high and is contrary to the requirements of Title VII.

Furthermore, equating the jury's answer to the state law proximate cause of damages question on the negligence issue with a finding that the conduct by Henley toward other female employees was not sufficiently severe or pervasive to alter the psychological terms of Collins' own working environment is a comparison of apples and oranges. The damages part of the state law question infers a monetary answer. It is about tangible damage. Title VII covers intangible harm as well. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. at 64. The state law question was not a psychological well being question. It was not a term, condition or privilege question in the broad sense. A state law proximate cause question involves hurdles not placed in an employee's way by Title VII. A showing of a state law proximate cause of monetary damages should not be necessary for a woman to prove her prima facie case of hostile environment discrimination and to shift the burden to the employers for rebuttal.

The Fifth Circuit was correct when it stated that, "The district court's failure to confront the factual issues directly is troublesome." *Collins,* at 195. Similarly troubling is the Fifth Circuit's imposition of its higher standard and its own failure to confront the factual issues directly. Title VII should not be held to impose such higher standards. The hurdles which women have to clear in the work place are sufficiently high, without making them any higher. The United States Supreme Court should grant the Petition and, upon final review, re-affirm that the evidence of hostile environment should be reviewed on the less onerous basis it has established in the past, not on some higher standard. The judgment of the Fifth Circuit on hostile environment should be reversed and remanded for review in light of the correct standard.

IV. THE FIFTH CIRCUIT ERRED IN ALLOWING THE NON-ADVISORY JURY'S LIMITED FINDINGS ON THE NARROW STATE LAW ISSUES TO BE SUBSTITUTED FOR FINDINGS ON THE FEDERAL LAW ISSUES THAT COULD BE ANALYZED UNDER THE APPROPRIATE TITLE VII STANDARDS AND BURDEN SHIFTING GUIDELINES.

In its search to find some basis for the District Court's ultimate findings, the Fifth Circuit states:

> The jury found that Collins was not fired for reporting acts of harassment and discrimination or for refusing to ignore harassment and discrimination. The jury also found, however, that the Center had failed to exercise ordinary care in investigating and stopping harassment and discrimination. Reconciling the findings,

> as we must, the jury presumably believed that there was misconduct but that Collins was not fired for opposing it. *Collins* at 192.

Although the jury was not instructed on the shifting burdens of proof outlined by the United States Supreme Court in *Burdine, supra*, the Fifth Circuit treats the state law issues submitted to the jury as though they were parallel. The state law issues submitted on wrongful discharge to the jury are *not* parallel issues to the Title VII federal issues that were to be determined by the district court.

The two wrongful discharge questions were premised on Texas' very narrow exception to the "at will" doctrine as stated in *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985). In that case, the Texas Supreme Court held that an employee's refusal to perform an illegal act was an exception to the "at will" doctrine if the termination was based solely on that factor. The "at will" doctrine in Texas allows an employer to terminate an employee for any cause or no cause. Question No. 3 in the present case was based specifically on that very narrow Texas exception to the "at will" rule.[1] The underlying premise behind the question was that Collins' refusal to ignore the sexual harassment and discrimination occurring at the Center would have been an illegal act on her part as a Personnel Director of the Center.

Question No. 1 was also *not* a parallel question to any

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[1] Question No. 3 to the jury was "Was Mary Collins wrongfully terminated by the Center for refusing to ignore sexual harassment and discrimination?" The jury answered, "No".

Title VII issue.[2] Rather, it was premised upon the Texas Supreme Court's decision to review the Texas Court of Appeals decision that an extension of the foregoing exception to the Texas "at will" rule did not protect employees who merely reported illegal acts to their employers. *Winters v. Houston Chronicle Publishing Co.*, 781 S.W.2d 408 (Tex.Civ.App.—Houston [1st Dist.]), affirmed, 795 S.W.2d 723 (Tex. 1990). At Collins' trial, the Texas Supreme Court had not yet affirmed the Texas Court of Appeals holding in *Winters*. It is error by the Fifth Circuit to equate questions submitted under these very narrow exceptions to the harsh Texas "at will" rule to the intricate, sensitive questions to be posed to a District Court under Title VII.

The Fifth Circuit apparently infers from the jury's findings that Collins was not fired for reporting acts of harassment and discrimination and that the jury found there was some other basis for her firing, i.e. perhaps insubordination. In light of what happened at trial, this is a highly speculative reconciliation by the Fifth Circuit. Shortly after it recessed, the jury's foreman sent out the following question:

> Are we supposed to determine what sexual harassment is or is it defined by law and if so, what is the legal definition?

The District Court responded by instructing the jury with an instruction, based loosely on EEOC regulations, as to what types of unwelcome sexual advances, requests for sexual favors and other conduct of a sexual nature constitute sexual harassment. The jury in the present case was obviously attempting to determine whether or not the

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[2] Question No. 1 to the jury was, "Was Mary Collins wrongfully terminated by the Center for reporting acts of harassment and discrimination?" The jury answered "No".

reports that Mary Collins turned in to Trustee Bill Denton were reports of sexual harassment and discrimination. The jury could very well have concluded that she was fired for filing the reports she filed and, yet, still have answered the questions in the negative. One logical conclusion that the jury could have reached in answering "No" to the questions was that Mary Collins was *not* reporting acts of harassment and discrimination, as defined by the District Court. Or it could have found the reported conduct was welcome. (Mr. Henley's secretary, for instance, apparently accepted the conduct. Other witnesses for the Center found it acceptable as well). Since the jury, after its first question was answered by the District Court, may have concluded the reports turned in by Mrs. Collins did not have the defined character, then it may have felt it had to answer "No" to the questions.

Considering the question that was asked by the jury, the Fifth Circuit's reconciliation of the jury's state law findings does not necessarily follow from those findings. The Fifth Circuit found substantial support of the District Court's findings in the jury's findings. The Fifth Circuit relied on *McKnight v. General Motors Corp.*, 908 F.2d 104, 113 (7th Cir.), *cert. denied* ____ U.S. ____, 111 S.Ct. 1306, 113 L.Ed.2d 241 (1991) in determining that a remand for explicit findings was not required on the basis that it is clear from the record and the jury's verdict what the jury must have found. The Fifth Circuit went on to imply that the jury had attendant credibility choices in arriving at what the Fifth Circuit viewed as parallel state claims. In fact, the jury may well not have been making any credibility determinations in answering the questions. The jury may well have determined its answer to the questions solely on an analysis of the type of reports that Mrs. Collins filed with Trustee Bill Denton.

The jury's findings on these narrow state law issues are not an adequate substitute for findings from the District Court on the employer's burden to clearly set forth specific, legitimate reasons for its termination of Collins and on Collins' showing that the sole reason tendered by the Center and Henley for her termination was unworthy of credence. The jury was not instructed to make this analysis. The District Court did not do so. The Fifth Circuit did not do so. Despite the Supreme Court's holding in *Burdine, supra*, the lower courts have allowed the employer to escape without a credible explanation for firing Collins. The lower courts have avoided altogether Collins' proof that the reason given was a mere pretext. The jury's answers do not fill in these gaps.

The jury was not an advisory jury. However, both lower courts are using it as such. This is totally improper. Had Plaintiff known it was going to be used as an advisory jury, she could have requested detailed instructions to the jury on the Title VII issues and burden shifting guidelines. It is not clear from the record and the jury verdict what the jury must have found. The District Court's incorporation of the jury's decision on the two wrongful discharge state issues is thus an inadequate substitute for specific findings of fact under well developed Title VII law by the District Court. As stated in the preceding section, the Fifth Circuit should also not substitute a state law proximate cause of monetary damages question for specific findings on the intangible effects of the hostile environment on Collins. The United States Supreme Court should grant the Petition and, after a full review of the case, reverse on both the retaliation and hostile environment claims in favor of Collins. This Court should not permit the substitution of speculative reconciliations of non-advisory jury findings on narrow state law issues for specific findings by the District Court on the Title VII issues.

V. IN ORDER TO FACILITATE REVIEW, DISTRICT COURTS SHOULD BE REQUIRED TO MAKE FINDINGS OF FACT UNDER THE CORRECT TITLE VII STANDARDS AND BURDEN SHIFTING GUIDELINES.

The struggle that an appellate court is put to when a district court does not make adequate, supporting findings of fact is evident throughout the *Collins* opinion. For example, the Fifth Circuit states, "Some of the district court's factual findings are sketchy if read alone." *Collins* at 192. It goes on. "The District Court's failure to confront the factual issues directly is troublesome." *Collins* at 195. With regard to the quid pro quo claim, the Fifth Circuit actually remanded to the District Court for further findings because "none of the state law claims paralelled the quid pro quo claim." *Collins* at 197.

The District Court's eighteenth finding was its only independent finding of fact. See Appendix D. It adopted the pretrial suggestions of Henley and the Center in whole as its other "findings of fact." Its only independent finding of fact shows that it was not analyzing the evidence presented under the correct Title VII standards of law. The Fifth Circuit refers to this sole independent finding by the District Court on page 195 of its opinion:

> The district court concluded the "uncontroverted testimony" showed that Henley was a "demonstrable" person and that there was no evidence that he was an abuser or molester of women, no evidence that he sought sexual favors from Collins or others, and no evidence that he was lewd or suggestive to Collins. *Collins,* at 195.

Title VII does not require that an employer be an abuser or molester of women in order to be found in violation of

Title VII. It does not require that the employer be proven to have sought sexual favors from the employee. The fact that the District Court stated these as findings of fact in support of its ultimate conclusions of law shows quite simply that the District Court either did not understand Title VII or was totally ignoring the applicable statutes and case law that had developed under Title VII. A more sensitive analysis is required by Title VII. Sexual harassment takes many forms.

The Fifth Circuit is not following Federal Rule of Civil Procedure 52(a) or its own precedent as stated in *Smith v. Texas Department of Water Resources*, 799 F.2d 1026 (5th Cir. 1986) in which it stated:

> What remains of the trial court's findings and conclusions is simply the statement that Plaintiff's failure to perform part-time secretarial relief work was "a valid business reason" for her discharge, and that any contrary evidence of sex discrimination is not credible. This is inadequate.
>
> Federal Rule of Civil Procedure 52(a) requires the trial court to "find the facts specially." The findings must be explicit enough to allow for appellate review:
>
> "If the trial court believes the employer's explanation of its motivation, the courts may not merely state, in conclusory terms, that the plaintiff has failed to prove the employer's suggested reason to be a pretext for invidious discrimination or that there is no evidence of discriminatory treatment. It must at least refer to the evidence tending to prove and disprove the merits of the proffered explanation and state why the court reached the conclusion that the explanation has not been discredited."

Ratliff v. Governor's Highway Safety Program, 791 F.2d 394, 400 (5th Cir. 1986).

As stated in *Redditt v. Mississippi Extended Care Centers, Inc.*, 718 F.2d 1381, 1386 (5th Cir. 1983):

"In reviewing the district court's finding of no discrimination under the clearly erroneous standard, this Court cannot be left to second guess the factual basis for the district court's conclusion. This Court cannot determine whether the district court's finding that Plaintiff failed to demonstrate pretext was clearly erroneous when the district court's finding is not expressed with sufficient particularity. It is not the function of this Court to make credibility choices and findings of fact."

The Fifth Circuit, in analyzing the retaliation and hostile environment claims, did not instruct the District Court to make specific findings under the precedential framework established by this Court. That would be the burden shifting guidelines outlined in *Burdine, supra* and *McDonnell Douglas Corp. v. Greene, supra.* Had it done so, when the District Court returned its more specific findings of fact, the Fifth Circuit would then have been able to analyze the findings without having to make the troublesome, speculative reconciliations and assumptions upon which its present opinion is based. The purposes of Title VII and Rule 52(a) would have been served. Such an analysis would have shown the obvious weakness in the Center's and Henley's case. They have no credible explanation of why Mary Collins was fired just a few hours after she openly opposed the sexual harassment of women by Henley at the Center. The lower courts are obscuring that simple fact with onerous standards of proof and unjus-

tifiable reconciliations of the evidence. The United States Supreme Court should reinforce its precedents in Title VII cases by reversing the Fifth Circuit in this case and remanding the case for further specific findings of fact.

CONCLUSION

The Fifth Circuit Court of Appeals has taken a step back from established United States Supreme Court and Title VII precedents. A clear message needs to be sent to employers with this case that Title VII does provide strong protections to employees. Where an employee, such as Mary Collins, is fired within a few hours of opposing sexual harassment, the employer must be able to specify legitimate, non-retaliatory reasons for the taking of such an action. The failure to state any specific reason should not be allowed to suffice. Poor record-keeping should not be allowed as an excuse for failure to provide specifics. Otherwise, Title VII protection against wrongful retaliation will be made meaningless.

The Supreme Court should reiterate that its well established guidelines for analyzing such cases under *Burdine, supra* do have meaning. District courts should be instructed to make specific findings of fact under those guidelines. Non-advisory jury determinations of narrow state law issues should not be allowed as substitutes for district court analysis and findings using the appropriate Title VII standards and the *Burdine* shifting guidelines.

Also, the higher standards of proof suggested by the Fifth Circuit for proving pretext and for proving a prima facie case of hostile environment discrimination should be rejected. Direct or indirect proof by the fired employee who opposed sexual harassment should be allowed to prove the employer's proffered reasons for the firing were pretextual.

Mary Collins met this burden. A non-onerous burden of proof on hostile environment cases should be imposed rather than the commensurately higher standard imposed by the Fifth Circuit. Mary Collins proved a hostile environment affected her terms of employment, using ordinary, non-onerous standards.

In this case, Mary Collins proved the reason given for her firing by Baptist Memorials Geriatric Center and Odus Taylor Henley was pretextual. They couldn't articulate any specific reason for her actual firing, let alone a legitimate reason. She openly opposed sexual harassment. She was fired a few hours later. Title VII should protect her and women who may find themselves similarly situated in the future. The United States Supreme Court should grant this Petition and reverse in favor of Mary Collins. The case should then be remanded for further consideration in light of the Supreme Court's opinion.

Respectfully submitted,

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